

No. 89-1439

Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

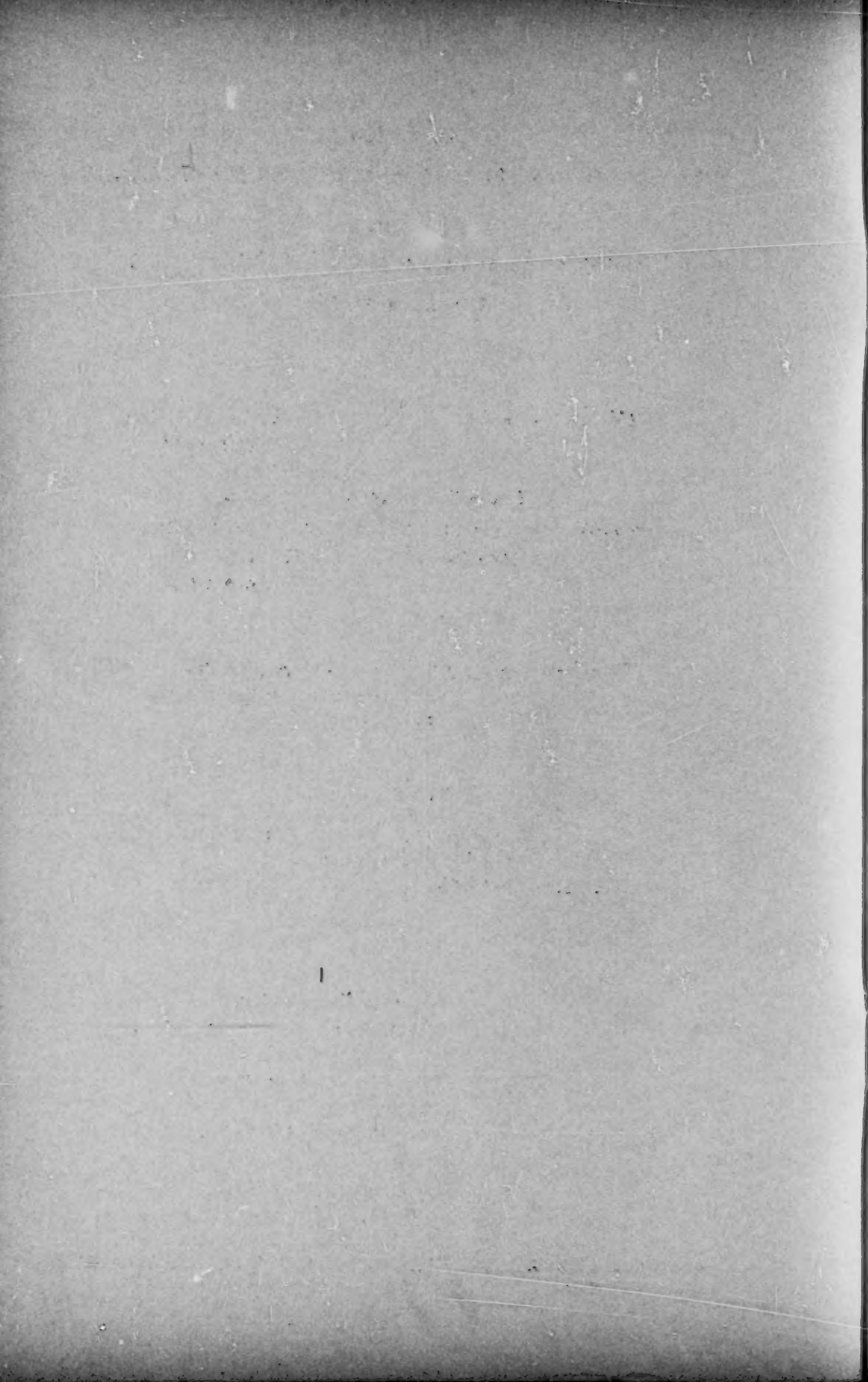
CENTRAL FLORIDA CLINIC FOR REHABILITATION, INC.,  
v. *Petitioner,*

CITRUS COUNTY HOSPITAL BOARD and  
BEVERLY ENTERPRISES, a California Corporation,  
d/b/a BEVERLY-GULF COAST, INC.,  
*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

BRIEF IN OPPOSITION  
FOR RESPONDENT  
BEVERLY CALIFORNIA CORPORATION

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**QUESTION PRESENTED FOR REVIEW**

Whether the courts below correctly concluded that there was no significantly probative evidence of an anti-competitive agreement outside the scope of the antitrust immunity conferred upon the Citrus County Hospital Board by the Florida state statute that created the Board?

## **PARTIES TO THE PROCEEDINGS BELOW**

The parties below were as listed in the Petition for Writ of Certiorari, except that the correct corporate identity of "Beverly Enterprises," listed in the Petition, is Beverly California Corporation, d/b/a Beverly-Gulf Coast.

Supreme Court Rule 29.1 requires listing of the following parent and subsidiary corporations of Beverly California Corporation:

Beverly Enterprises, Inc, a Delaware corporation, owns all of the voting securities of Beverly California Corporation.

Beverly California Corporation has a partial ownership interest (indicated in parentheses) in the following corporations:

Vantage Health Care Corporation (25%)

Beverly Japan Corporation (49%)

Colonial Manors of Oakland, Inc. (21.1%)

Riverview Development Corporation (2.79%)

Treatment Centers of America (61%)

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**BRIEF IN OPPOSITION  
FOR RESPONDENT  
BEVERLY CALIFORNIA CORPORATION**

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**STATEMENT OF THE CASE**

Central Florida Clinic for Rehabilitation ("CFCR") filed a complaint against the Citrus County Hospital Board ("the Board") and Beverly Enterprises ("Beverly"), alleging that an agreement between the Board and Beverly had caused the Board to replace CFR as

the provider of therapy services in a nursing home operated by Beverly in the town of Inverness, Florida. CFCR's third amended complaint alleged that the Board had breached a duty to maintain the confidentiality of information obtained in CFCR's attempt to sell its business to the Board, that the Board had tortiously interfered in CFCR's contractual relationship with Beverly and others, and that the Board had attempted to monopolize a market for nursing home therapy services in the Inverness area of Citrus County, Florida. CFCR alleged that the Board and Beverly had violated section two of the Sherman Act by conspiring to monopolize the above market, and had restrained trade in violation of section one of the Sherman Act by agreeing that Beverly would replace CFCR with the Board as the therapy provider in the Inverness nursing home, and the Board would refer patients to Beverly. (The text of sections one and two of the Sherman Act, 15 U.S.C. §§ 1 & 2, is set forth at pages vii-viii of CFCR's Petition for Writ of Certiorari ("Petition").)

Beverly answered the complaint, denying any anti-competitive agreement with the Board, and stating that it had lawfully terminated its contract with CFCR because it was not satisfied with CFCR's performance.

The Board did not answer the complaint, but moved for summary judgment on the antitrust claims on the ground that the Florida statute establishing the Board contemplated that it might enter into anticompetitive conduct, and therefore the alleged conduct was immune from the antitrust laws as state action.

After completion of discovery, and shortly before the trial, the District Court granted the Board's motion for summary judgment on the antitrust claims. Beverly then moved for summary judgment on the ground that all claims against Beverly were based on the alleged agreement with the Board that had been found immune from the antitrust laws. The court granted Beverly's

motion, disposing of all the federal claims in the case, and then dismissed the pendent state law claims.

CFCR appealed the summary judgment ruling to the Court of Appeals for the Eleventh Circuit, and after oral argument the Court of Appeals affirmed *per curiam* without opinion. CFCR moved for rehearing in banc, which was denied on December 14, 1989.

### SUMMARY OF ARGUMENT

The decision below can be sustained entirely on the District Court's conclusions as to the relevant facts. Full discovery was held and the case was ready for trial. Plaintiff did not allege that a monopoly had been attained or even that there had been a specific restraint of trade, just that plaintiff had been excluded from providing therapy services at one nursing home. The District Court concluded that there was no significantly probative evidence of anticompetitive conduct outside the scope of state legislative authorization.

The basic error claimed in the petition for certiorari is that the District Court made overbroad statements as to the types of anticompetitive conduct contemplated by the Florida legislature in the statute creating the Board. If the decision is left untouched, it would not conflict with any decision of this Court or any Circuit because the District Court's statements about state action immunity are not necessary to sustain the decision below.

Certiorari would likely be improvident because the factual allegations in this case, taken as admitted for purposes of summary judgment, are not sufficiently specific to develop the legal issues clearly. The opinion of the District Court was not reported, and was affirmed without opinion by the Eleventh Circuit. Thus, even if the unreported opinion conflicts with decisions of this Court, there are opinions by the Eleventh Circuit that are consistent with this Court's rulings which would prevail over the District Court opinion as precedent.

## ARGUMENT

### **I. THE DECISION BELOW CAN BE SUSTAINED ON THE BASIS OF THE LOWER COURTS' CONCLUSIONS ABOUT THE CONDUCT ALLEGED, WITHOUT ELABORATING ON THE LAW OF STATE ACTION IMMUNITY.**

CFCR argues that the statute that created the Board cannot confer antitrust immunity because it merely authorizes the Board to provide hospital and other health care services, without specifically indicating that certain anticompetitive actions are contemplated. CFCR's argument focuses almost exclusively on the Florida statutes that apply to hospitals, and on this Court's state action immunity decisions. The specific nature of the anticompetitive conduct alleged by CFCR remains undeveloped.

The central claim of CFCR's complaint was that the Board decided to enter the therapy business, negotiated with CFCR about buying CFCR's business, obtained confidential information about CFCR's business and customers, and then conspired with Beverly to displace CFCR as the therapy provider at the nursing home. Almost all of the specific allegations of misconduct relate to the tort claims. The antitrust claims rest on the central proposition that the Board and Beverly agreed to dislodge CFCR from its contract to provide therapy at Beverly's nursing home, and that it violated the antitrust laws for them to do so.

The District Court simply did not believe this conspiracy claim was credible enough to submit to a jury. In part, the District Court based this conclusion on its detailed interpretation of the scope of antitrust immunity created by the Florida statutes involved. It is that detailed but rather unfocused search for statutory intent that CFCR asks this Court to review. The District Court's opinion rests on solid ground even without such a review.

There is no dispute that the Board was authorized by the state legislature to provide hospital and therapy services. Petition, page 5. The District Court concluded that CFCR did not bear its burden of showing that the Board engaged in anticompetitive activity outside the normal scope of those authorized services. The District Court's opinion says that:

The parties have had adequate time for discovery, and, for the purposes of the motion, there is no dispute as to the material facts.

Appendix to Petition for Writ of Certiorari ("Appendix"), page 6 (citations omitted).

The opinion reviewed the alleged actions of the Board, insofar as possible on the pleadings, and concluded that:

[T]here is no significantly probative evidence in the instant case that the conspiracy between the Board and Beverly, assumed to be true, was not within the scope of the Board's authority.

Appendix, page 29. An overly literal reading of the opinion might suggest the District Court believed that the Board was authorized by the statute to enter into conspiracies to monopolize therapy in Citrus County. To the contrary, the court properly concluded that generalized conspiracy allegations do not defeat state action immunity and require a trial.

Beverly affirmed in its answer that it terminated its therapy contract with CFCR because it was not satisfied with CFCR's performance. The District Court could have granted summary judgment because Beverly's termination of the CFCR contract was just as likely to be an independent decision as one produced by a conspiracy. See, *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984).

The District Court properly noted that summary judgment is required when, after full discovery, a party fails to make a showing sufficient to establish the existence

of an element essential to the party's case, on which that party would bear the burden of proof at trial. Appendix, page 2, quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). A trial court should grant summary judgment in the event that the non-moving party fails to come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 587 (1986).

## **II. THE ELEVENTH CIRCUIT'S DEFINITION OF THE STATE ACTION DEFENSE DOES NOT REQUIRE REVISION BY THIS COURT.**

The basic error alleged is that the District Court opinion made overbroad statements about the types of anti-competitive actions contemplated by the statute authorizing the Board to provide hospital and other health care services. Petition, page 9. If the Court were to grant certiorari, the decision would likely be improvident because the factual record below is not well developed, and lends itself only to an abstract discussion of the law. Review also is unnecessary because other opinions by the Eleventh Circuit would prevent the per curiam decision in this case from being cited as precedent in conflict with the decisions of this Court or the Circuit Courts of Appeal.

The District Court opinion correctly stated that state action immunity exists if the allegedly anticompetitive conduct is the type of conduct contemplated by a clearly articulated and affirmatively expressed state policy. Appendix, page 8. There is nothing in the opinion to compel the conclusion that the District Court failed to follow this standard. As is shown in Section I above, the District Court's detailed discussion of statutory intent is not necessary to justify the result reached.

If the District Court opinion had said anything in conflict with the many state action decisions by this

Court and the Circuit Courts of Appeal, this Court would not need to reach out to correct it. The Eleventh Circuit decisions cited by CFCR (Petition, pages 15-23) are consistent with the "clearly articulated and affirmatively expressed" standard used by this Court. For instance, the Eleventh Circuit's decision in *Commuter Transportation Systems v. Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986), provides a thorough and correct examination of a Florida statute to see whether certain specific anticompetitive actions were contemplated by a clearly articulated and affirmatively expressed state statutory policy.

CFCR argues that there is a conflict between the *Commuter Transportation* decision and the present case because the Board in this case had less explicit authority to eliminate competition than the Hillsborough County Aviation Authority did in the *Commuter Transportation* case. Petition, page 21. CFCR argues that the Board's enabling legislation does not necessarily contemplate anticompetitive action by the Board. *Id.* This general discourse on statutory intent is simply not necessary because the summary judgment in this case can be justified on the basis of the District Court's correct assessment that CFCR would not be able to prove anticompetitive conduct outside the normal scope of a municipally-owned business enterprise.

CFCR's argument might be persuasive if this Court had ruled, or wished to rule, that in order to make out a state action defense, the state legislation involved must specifically recite that it expects anticompetitive activity by the municipality. As the District Court correctly pointed out, this Court already has decided that it is

not necessary . . . for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects.

Appendix, page 13, quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985). This Court may

never have the opportunity to perfectly define how “clearly articulated” a state policy must be for a municipality to invoke the state action defense. *Id.* at 40. The present case, however, does not present an opportunity to improve on the answer to that question given in the *Town of Hallie* decision and related decisions. If such an opportunity is presented, it will very likely involve more clearly defined claims of anticompetitive conduct than the present case.

### III. PETITIONER CONCEDED THAT ANY STATE ACTION IMMUNITY ENJOYED BY THE BOARD APPLIES EQUALLY TO BEVERLY.

Section III of this brief is included only because Supreme Court Rule 15.1 requires that any misstatements in the petition must be pointed out in the brief in opposition to certiorari and not later, if they have a bearing on what issues properly would be before the Court if certiorari were granted.

The petition does not state that the parties below agreed that any immunity enjoyed by the Board applies also to Beverly. The District Court based its oral opinion granting Beverly’s motion for summary judgment on this undisputed proposition. Appendix, page 41. The opinion quoted the following admission from CFCR’s pleadings:

CFCR reluctantly admits that it is unable to find any case law supporting the position that here Beverly . . . would be liable for violations of the federal antitrust laws as a result of its dealings with the Board, an immune party.

*Id.*

Even if certiorari were granted, the issues would not include whether the Board could enjoy state action immunity without the immunity extending also to Beverly.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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